IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 693 of 1997
With
CRIMINAL REVISION APPLICATION No. 284 of 1997

For Approval and Signature:

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
BHUPENDRABHAI NANDLALBHAI AND ANOTHER

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Appearance :

CRIMINAL APPEAL No. 693 of 1997

Mr.K.T.Dave,learned APP for appellant
MR Yogesh S.Lakhani with Mr.J.A. ADESHRA for Opponent(s) : 1 – 2.

CRIMINAL REVISION APPLICATION No. 284 of 1997

Mr.P.S.Champaneri for the petitioner.

MR Yogesh S.Lakhani with Mr.J.A. ADESHRA for

respondent Nos.1 and 2
Mr.K.T.Dave,learned APP for the respondent No.3
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CORAM : HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 12/10/2007

COMMON ORAL JUDGMENT

1. By way of this appeal under Section 378 of the Code of Criminal Procedure, 1973, the State of Gujarat has challenged the judgment and order dated 16th May,1997, passed by the learned Chief judicial Magistrate, Surendranagar, in Criminal Case No.7352 of 1996 whereby both the respondents have been acquitted of the charges for offences punishable under Sections 304A and 114 of the Indian Penal Code.

2. The respondents herein are practising Doctors who have been charged for having caused the death of Sarojben, wife of the complainant, due to rashness and negligence. In order to appreciate the matter in its proper perspective it will be necessary to narrate the facts which have given rise to the case.

3. The case of the prosecution is based upon the complaint lodged by Ganshyambhai Rasiklal Soni on

17th May, 1996, at City Police Station, Surendranagar, to the effect that, on the fateful day of 17th May,1996, his wife Sarojben was to undergo an operation for nasal polyps at the Hospital of the respondents. For this purpose, an appointment had been fixed on the previous day. Therefore, on 17th May 1996, Sarojben went to the Hospital of the respondents at 11.30 A.M. It is stated in the complaint that Sarojben was taken into the operation theatre at about 1.45 P.M. and the complainant was told by the respondents that the operation would take approximately 45 minutes. However, when the door of the operation theatre did not open till 4.30 P.M., the complainant knocked on the door and the respondent No.1 came out of the theatre. During the operation, respondent No.2 was also present there. It is further narrated in the complaint that on the complainant enquiring from the respondent No.1, he was informed that the operation had failed and the wife of the complainant had suffered heart failure. Thereupon, the complainant informed his close relatives and called them to the Hospital and also lodged the complaint as narrated above.

4. Upon the complaint being registered, the

investigative machinery was set into motion and the dead body of Sarojben was sent for post mortem. The inquest panchanama and panchanama of the scene of offence were prepared and the statements of witnesses were recorded. In addition, statements of Doctors specialising in the field were also recorded and a prima facie case having been found against the respondents, the charge-sheet was submitted in the competent court. The relevant statements of the prosecution witnesses and medical experts were put to the respondents. In their statements under Section 313 of the Code of Criminal Procedure, the respondents have denied being guilty of rashness or negligence in performing the operation upon the wife of the complainant. The respondents have stated that they have followed the correct medical procedure and treatment, which is given in the normal course, as known to medical science. A heart specialist was also called to treat the deceased. The defence of the respondents is that they have taken all due care and caution and given proper treatment to the deceased and, therefore, her death cannot be attributed to rashness or negligence in the performance of their professional duty. Accordingly, the case was put to trial.

5. In support of the case of the prosecution, as many as twelve witnesses were examined and certain documentary evidence was also brought on record. After having heard the submissions advanced by the learned counsel for the parties and having appreciated the oral and documentary evidence led by the prosecution, the learned trial Magistrate came to the conclusion that the prosecution has completely failed to prove the negligence of the accused doctors and recorded a finding of acquittal in favour of the respondents, giving rise to the present appeal.

6. I have heard Mr.K.T.Dave, learned Additional Public Prosecutor for the appellant and Mr.Yogesh S.Lakhani with Mr.J.A.Adeshara for the respondents and have scrutinised the record summoned from the trial court. Mr.K.T.Dave, learned Additional Public Prosecutor has vehemently argued that the impugned judgment and order of acquittal passed by the learned trial Magistrate is contrary to law and the evidence on record. He has submitted that the trial court has not appreciated the facts as brought out in the post mortem report that the deceased died due to failure of the respiratory system and that there was evidence

of blood found in the trachea, which ultimately resulted in her death. It is further submitted by the learned Additional Public Prosecutor that the medical evidence on record as well as the evidence of the experts has not been properly appreciated by the trial Court. According to the learned Additional Public Prosecutor, there is sufficient evidence on record to prove that the respondents were negligent in the performance of the operation, due to which the wife of the complainant died, even though the operation was a minor one. For the reasons stated above, Mr.K.T.Dave, learned Additional Public Prosecutor, has urged that this court should allow the appeal and set aside the order of acquittal.

7. On the other hand, Mr.Yogesh S.Lakhani with Mr.J.A.Adeshara for both the respondent Doctors has forcefully submitted that the prosecution has completely failed to establish that the death of Sarojben was caused due to rashness and negligence on their part. He submitted that the respondents have taken all possible care and caution in the performance of the nasal operation of the deceased. He has further submitted that there is evidence to show that when the deceased was suffering from a

sudden collapse, the respondents adopted all possible means to revive her. An endotracheal tube, to facilitate the breathing of the deceased, was inserted and a heart specialist was also called in order to treat the patient, who was suffering from cardiac arrest. Mr.Yogesh S.Lakhani has submitted that in spite of giving all possible treatment to the deceased, as is evident from the evidence on record, the patient suffered irreversible cardiac arrest and therefore, the prosecution has failed to establish that her death was a result of rashness or negligence attributable to the respondents. The learned counsel for the respondents has drawn my attention to various aspects of the oral and documentary evidence on record, which shall be referred to in their proper place, hereinafter. It is submitted that the trial court has come to a correct conclusion in recording a finding of acquittal in favour of the respondents and this court, in appeal, ought not to disturb the same since there is no illegality or infirmity in the judgment and order of the trial court. The learned counsel for the respondents has placed reliance upon two judgments of the Apex Court, **Dr.Suresh Gupta v. Govt.of N.C.T.of Delhi, reported in AIR 2004 SC 4091**

and **Jacob Mathew v. State of Punjab and another, reported in 2005(3) Crimes 63 (SC)** in support of the submissions made by him. On these grounds, it is prayed that the appeal be dismissed.

8. In view of the rival submissions of the parties, it becomes necessary to re-evaluate and re-appreciate the reasons recorded by the trial court in the light of the evidence on record, in order to come to a conclusion whether, the finding of acquittal has been correctly recorded. This exercise has to be undertaken, keeping in sight the principles of law enunciated by the Supreme Court as applicable to an appeal against acquittal. It is now settled law that although the appellate court is vested with power to re-appreciate and re-evaluate the evidence on record, generally, it would not interfere with an order of acquittal unless it is found that the judgment of the trial court is perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. **(See Ramesh Babulal Doshi v. State of Gujarat (1996)9 SCC 225)**. Further, as held in **Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773** where two views are possible on the

evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. It is on the touchstone of the above principles that this court is called upon to decide whether, the respondents have been rightly acquitted of the charge of causing the death of Sarojben by their rashness and negligence during the operation.

9. It would be useful to advert to Section 304A of the Indian Penal Code, which reads as under:

> **"304A. Causing death by negligence.-** Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

10. To constitute an offence under Section 304A, it is incumbent upon the prosecution to establish that the death has occurred due to a rash and negligent act of the accused, which does not amount to culpable homicide. It would also be necessary to advert to the salient features of the testimonies of the prosecution witnesses.

11. P.W.1 Ganshyambhai Rasiklal Soni is the

complainant and has been examined at Exh.5. He has stated in his deposition that on 16th May, 1996 he had taken his wife Sarojben to the Hospital of the respondents for treatment, and it was decided that She would be operated upon for nasal polyps on the next day i.e. on 17th May, 1996. The consent letter for the operation (Exh.7) was signed by him and Sarojben was taken into the operation theatre at about 1.45 P.M. on 17th May,1996. It is stated that the respondent No.1 had informed him that the operation would take about 45 minutes. However, when sufficient time had elapsed, he started to knock upon the door of the operation theatre and the respondent No.1, on opening the door, informed him that Sarojben had suffered heart failure and had expired. In his examination-in-chief, Ganshyambhai states that the respondents behaved in an uncivilised manner with him and did not inform him when Sarojben suffered heart failure. However, in cross-examination this witness admits that, during the period when he took Sarojben to the Hospital of respondent No.1, he was having very good family relations with the said Doctor. P.W.Ganshyambhai states in his examination-in-chief that it was he who called Dr.Gedia, the heart specialist, after being informed by the

respondents that Sarojben had suffered heart failure. However, in his cross-examination P.W. 1 states that when he entered the operation theatre, the respondent No.2 was giving massage to the deceased. Although he states that at that time there was no oxygen tube in the nose of the deceased, in the next sentence he admits that when the heart massage was being given to his wife, the oxygen tube was present in her nose. P.W.1 also admits that he did not go to call Dr.Gedia, the heart specialist, and neither did he telephone him. On the whole, the testimony of this witness is almost in conformity with the narration in the complaint and he has tried to build a story that his wife died due to the negligence of the respondents.

12. P.W.2 Sushilaben Lalitbhai, who has been examined at Exh.12 is one of the panch witnesses of the inquest panchanama at Exh.13. P.W.3 Naineshkumar Bhogilal,who has been examined at Exh.14 is also the panch witness and the testimony of this P.W. is formal in nature.

13. P.W.4 Nirmalaben Rameshchandra Soni,who has been examined at Exh.18 is the sister of P.W.1. The

deceased was her brother's wife. The testimony of this witness is not of much help to the case of the prosecution. From her cross-examination it transpires that the deceased had been taking treatment from the respondents for nasal polyps prior to 16th May, 1996. She has stated that she did not enter the operation theatre and has not seen anything regarding the operation.

14. P.W.5 Dhaneshbhai Chimanlal Soni, who has been examined at Exh.19, is the brother of the deceased. His examination-in-chief is almost a repetition of the statements made by P.W.1. However, in his cross-examination this witness admits that the respondent No.1 telephoned Dr.Gedia, who is a heart specialist and also one Dr.Acharya, in his presence. He further states that when he entered the operation theatre a massage was being given to his sister by respondent No.2 and this massage continued till Dr.Gedia's arrival. It is also admitted by this witness that Dr.Gedia examined the deceased in his presence. He, however, states that no oxygen pipes were present in the mouth of the deceased.

15. P.W.6 Rasiklal Jerambhai Soni, who has been

examined at Exh.20, is the father-in-law of the deceased. His testimony is not of much importance, since he arrived at the Hospital after the operation had started. He does not seem to have any direct knowledge of the events that took place.

16. One of the most important prosecution witnesses is P.W.7, Bansidhar Ganpatlal Gupta who has been examined at Exh.24. He has performed the post mortem on the dead body of the deceased. Since the testimony of this witness is very material, it is being adverted to in some detail. In his examination-in-chief Dr.Gupta states that when he was serving as Professor and Head of the Department of Medicines at M.P.Shah Medical College, Jamnagar, on 18th May 1996 at 9.30 A.M., the Head Constable on duty at Surendranagar had brought the dead body of Sarojben, wife of Ganshyambhai to him, for performing the post mortem, which was started at 11.0 A.M. by him and his colleague, Assistant Professor Dr.S.Kumar, and completed at 1.15 P.M. on the same day. On examining the dead body, it was found that Hospital band-aids were applied on the nose and upon opening the same, a sleek and long piece of gauze packing was found in both the nostrils and blood was oozing out from the

nose and mouth. The fingers and nails of the dead body had turned greenish in colour and on the left hand side of the chest, in the region of the heart, six marks of injection were detectable. The dead body had other marks of injections on the : (1) outer portion on left wrist, (2) front portion of left elbow, (3) back portion on of right hand, (4) front portion of right elbow and, (5) front portion of right leg. Besides these marks, other marks of injection were also found on the right and left buttocks of the dead body. On dissection of the nose, it was found that the wind pipe and the inner part of the nose were soaked with blood and the space below the said packing in the nose was reddish, and full of blood. In the wind pipe of the deceased, the presence of blood mixed with mucus, as well as froth was detected. Both the lungs were congested and on cutting them open, a liquid substance mixed with froth oozed out. After stating that the organs such as lungs, heart, liver, kidneys etc. were retained for histo-pathological examination, this witness states that after receiving the report of the examination and after reading the clinical papers of the case, in his opinion the death of Sarojben occurred due to asphyxia and heart failure, due to

blood entering into the wind pipe, from the site of the operation. Dr.Gupta further states that the post mortem report at Exh.25 has been prepared in the hand writing of his colleague Dr.S.Kumar and, in that report, the final cause of death was kept pending. It is further stated by P.W. Dr.Gupta that on 25th July,1996, the final death report had been given in which the cause of death was the same as stated above. The final opinion sent to the police regarding the cause of death of the deceased is at Exh.27. In his testimony, P.W. Dr.Gupta categorically states that he had not found any evidence of negligence in the earlier treatment given by the respondents. This witness was cross-examined at great length but has consistently stood his ground.

In his cross-examination, Dr.Gupta has stated that the death of Sarojben has not occurred due to excess bleeding. He has also categorically stated that if the endotracheal tube is inserted,then blood does not collect in the trachea and the case papers of the deceased show that the endotracheal tube was inserted. This witness states that if the tube is removed and there is bleeding, without clotting, then blood comes down by force of gravity, and after

death, within twelve to eighteen hours, the blood converts itself into a liquid form. Dr.Gupta further states that when he examined the dead body for the first time, the death had occurred within 24 hours. Regarding the presence of blood in the trachea of the deceased, Dr.Gupta states that due to the blood converting itself into liquid form, the possibility of it being found in the trachea cannot be ruled out and it cannot be said that blood had collected in the trachea, during the operation. This witness further states that the death of the patient could occur partly due to asphyxia and partly due to stopping of the heart. P.W. Dr.Gupta categorically states that as per his belief, firstly Sarojben had trouble in breathing and thereafter the heart stopped and thereafter the breathing also stopped. He has clearly stated in terms, that the Doctors who treated the deceased had made all efforts to revive the heart by giving injections and after the heart stopped, the Doctors were not in a position to give any other treatment. This witness goes on to state that in his opinion, the respondent Doctors had given every possible treatment available in medical science. Dr.Gupta has deposed that he, alongwith his assistant, had examined the lungs, eyes, brain,

liver, spleen and kidney of the deceased and did not find any petechial haemorrhage which is found if death had occurred due to complete respiratory obstruction. Dr.Gupta has ruled out any possibility of over-dose of medicine. This witness has remained firm in his testimony to the effect that during the operation the endotracheal tube was inserted and complete arrangement for breathing was made by the Doctors and the stopping of breathing did not relate to any negligence during the operation. He has concluded his testimony by stating that due to unknown reasons, there are instances when the heart stops functioning. Sometimes, even for negligible reasons, the heart stops working due to vagal shock and in this case, the possibility of vagal shock cannot be ruled out.

17. P.W.8 Prabhatba Bahadursingh has been examined at Exh.30. At the relevant point of time, she was working as a Nurse in the Hospital of respondent No.1. In her examination-in-chief she states that the deceased was admitted in the Hospital for undergoing an operation for her nasal problems on 17th May,1996. P.W. Prabhatba states that she was in the operation room when the operation on Sarojben was being

performed. This witness further states that during the course of the operation, Sarojben started having difficulty in breathing, therefore, the respondent No.2 inserted the oxygen pipe in her throat but the patient could not survive and expired in the operation theatre. In her cross-examination, this witness states that the respondent No.2 administered anaesthesia to the patient and after the operation when the Doctor was shifting the patient to the ward, and the endotracheal tube had already been inserted in Sarojben's throat, she had difficulty in breathing. This witness confirms that the respondents administered injections to Sarojben and gave a massage. They also called Dr.Gedia and continued giving massage till Dr.Gedia arrived.

18. P.W.9 Rasikbhai Vithalbhai Patel, who has been examined at Exh.31 was working as a Compounder in the Hospital of respondent No.1 when the operation of the deceased took place. He states that he, alongwith P.W.8, were present in the operation theatre at the time of the operation. In his cross-examination, this witness states that after the operation was over, the respondent No.1 had directed that the patient (Sarojben) be shifted to the Ward when she

regained consciousness. This witness categorically states that the tube had been inserted in the mouth of Sarojben and when the respondent No.2 examined her and found that Sarojben having difficulty in breathing, he had at once started giving her massage and called the husband of the deceased as well as Dr.Gedia.

19. Another witness, whose testimony has considerable relevance, is P.W.10 Dr.Satishkumar Puranchand, who has been examined at Exh.33. He has performed the post mortem alongwith P.W.7 Dr.Gupta. The testimony of this witness is in conformity with that of P.W.7 in all material aspects. He identifies the hand-writing on the post mortem report and the reports at Exh.25 and 26 as being his own and states that in the post mortem report the opinion that Sarojben had died due to respiratory failure was the joint opinion of himself and his senior, Dr.Gupta. This witness was also subjected to lengthy cross-examination and his testimony has remained unshattered.

In his cross-examination he states that the dead body of Sarojben was sent to them i.e. Dr.Gupta

and himself for expert opinion to find out whether there was any negligence by the respondents in performing the operation. This witness states that in the post mortem report and in the reports at Exhs.25 and 26 he and Dr.Gupta have written that no evidence of negligence had come to their notice during the performance of the operation. Further Dr.Satishkumar goes on to state that cardiac respiratory failure can occur due to many reasons and also due to vagal shock, which first affects the heart and is irreversible. He states that in medical science it is permissible to give four to five injections straight on the heart and over and above this, if one additional injection is given there is no adverse effect. He opines that if the heart has not gone into irreversible shock, then there is a possibility that it may restart after giving these injections. However, he states that vagal shock can occur due to many ordinary circumstances such as joy, sorrow or other ordinary reasons. This witness categorically states that on seeing the case papers of the patient (deceased) it can be seen that all efforts were undertaken to restart the heart of the patient and to continue the breathing. He further admits that due to insertion of endotracheal tube, the blood could not

collect in the trachea and if the endotracheal tube is removed after death, blood converts into liquid form within six to twelve hours from the time of death. Dr.Satishkumar states that when the dead body of Sarojben was brought before them, 14 hours had already elapsed and the nasal packings in the body was soaked with blood. It is clearly stated by this witness that in this case, the blood in the nasal packing can be a result of bleeding after death.

20. Dr.Umeshchandra Savjibhai Gedia, the heart specialist, has been examined as P.W.11 and his testimony is to be found at Exh.34. He has stated that on 17th May, 1996 he received a telephone call from respondent No.1 at about 4.30 P.M. and reached the Hospital of respondent No.1 at about 4.45 P.M. He deposed that when he reached, the respondent No.2 was giving a cardiac massage to the patient, who was lying down. Dr.Gedia states that he took the detailed case history of the patient and was informed that the patient had suffered heart failure due to which he had been called. Regarding the condition of the patient, he states that the reading of the pulse and blood pressure could not be taken. Dr.Gedia states that the endotracheal tube had been inserted in the

throat of the patient. In his cross-examination Dr.Gedia has stated that he assisted the respondent No.2 in giving cardiac massage to the patient and at the time of the massage, the endotracheal tube was in the mouth of the patient and the oxygen was also being given to her. This witness has categorically stated that in spite of the cardiac massage being given the heart did not revive. He further states that whatever was possible in medical science was done to revive the heart. Dr.Gedia states that after death, the endotracheal tube is removed from the mouth.

21. P.W.12 Navinbhai Hirjibhai Danak is the investigating officer in this case and his testimony, at Exh.35 is not of much relevance. Although this witness has stated that according to the Doctors the death of Sarojben took place due to suffocation, he is hardly an expert in medicine and, therefore, this aspect of his testimony cannot be given much importance.

22. The documentary evidence consists of the clinical case papers pertaining to the deceased, the report of the chemical analysis of the viscera,

report of the histo-pathological examination and other medical papers, the contents of which have been put to the medical witnesses and have been discussed in detail in their respective testimonies.

23. This, in totality is a gist of the relevant evidence brought on record by the prosecution.

24. On re-appreciation of the evidence, as reproduced hereinabove, it emerges that it is undisputed that Sarojben died during a minor operation for nasal polyps, performed upon her by the respondents. What remains to be ascertained is whether the respondents had been rash and negligent in performing the said operation and whether Sarojben's death was caused due to their rashness and negligence? From the depositions of the prosecution witnesses, certain irrefutable aspects emerge. These are:

(a) From the testimony of the complainant, examined as P.W.1, it is clear that respondent No.2 gave a cardiac massage to his wife and the oxygen pipe had been inserted in her nose.

(b) P.W.1 admits in cross-examination that he had not called Dr.Gedia, which lends credence to the already strong evidence on record that the respondents called the heart specialist when

Sarojben faced cardiac arrest.

(c) P.W.5 Daneshbhai Chimanlal, admits that the respondent No.1 telephoned Dr.Gedia, the heart specialist, and one Dr.Acharya, calling them to the Hospital,in his presence. He testifies that respondent No.2 gave cardiac massage to his sister, which continued till the arrival of Dr.Gedia.

(d) P.W.7 Dr.Gupta has clearly stated that the Doctors who had treated Sarojben earlier had not been negligent in any manner,and that the endotracheal tube had been inserted. He has stated that numerous injections had been given to the deceased in the region of her heart and other parts of the body for revival of the heart and whatever treatment was available in medical science had been given to the deceased. This witness has categorically ruled out any rashness or negligence in the performance of the operation by the respondents.

(e) Similarly, P.W.10 Dr.Satishkumar, has stated that there was no rashness or negligence on the part of the respondents in the performance of the operation.

(f) The heart specialist, P.W.11 Dr.Umeshchandra Gedia, too stated in terms that when he arrived at the Hospital of the respondent No.1, the respondent No.2 was giving cardiac massage to the patient which continued for some time and he

also assisted in that procedure. This witness has clearly stated that the oxygen tube was present in the mouth of the deceased and in spite of cardiac massage, the heart of the patient could not be revived. Dr.Gedia, as a medical expert, has stated that whatever procedures were available to medical science were tried but the patient could not be saved.

(g) Even though P.W.8 Prabhatba, who was working as a Nurse and P.W.9 Rasikbhai, who was working as a Compounder at that point of time are not expert witnesses and are employees of the respondents, their testimonies cannot be disregarded totally. A perusal of their statements show that the oxygen was being administered to Sarojben and respondent No.2 was giving a heart massage to her. It is also evident from their testimonies that the heart specialist was summoned when the patient began to experience heart failure.

25. A cumulative reading of the above narration of the salient features emerging from the evidence on record, it is crystal clear that the respondents have not been rash or negligent in the performance of the operation on the deceased Sarojben, during which she, unfortunately, expired. The respondents had inserted the endotracheal tube and were giving oxygen to facilitate breathing, during the operation, and these

were in place till Sarojben died. There is irrefutable evidence on record that a cardiac massage was given to save the patient, various injections were administered in order to revive the heart and the heart specialist was called in, who also tried his best to revive the patient who, in spite of best efforts, could not be saved. The cause of death, as per opinion of Dr.Gupta and Dr.Satishkumar is partly due to asphyxia and partly due to heart failure. This cannot, by any stretch of imagination, be attributed to rashness or negligence on the part of the respondents in the performance of the nasal operation on Sarojben.

26. In **Jacob Mathew v. State of Punjab (Supra),** the Supreme Court has exhaustively dealt with the question of medical negligence. Their Lordships have summed up their conclusions as under:

> “(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three:

'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to

possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in

> service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.
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> 50.In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).”

27. If the evidence on record is tested on the touch-stone of the conclusions drawn by the Apex Court, it is clear that the respondents, who are skilled in their professions, have exercised reasonable care and competence in the performance of their medical duties. Far from being rash and negligent, the evidence reveals that they have tried to do everything that they could possibly do, in the facts and circumstances, to save the life of Sarojben. The fact that they were not successful in doing so even after adopting all the standard medical procedures, cannot be attributable to lack of care

or for that matter, rashness or negligence on their part. It is not the case of the prosecution that the respondents failed to adopt any known medical procedure which they should have, or did some act contrary to what any prudent and cautious medical professional would have done in the same situation. Nor is it the case of the prosecution that the respondents did not possess the requisite medical skills. Then, what was that act or omission on their part which was allegedly rash and negligent in nature and which caused the death of Sarojben? There is not an iota of evidence on record to prove this. However, there is sufficient evidence to the contrary.

28. In the ultimate analysis, I am of the considered opinion that the trial Court did not commit any error in recording a finding of acquittal in favour of the respondents. I do not find any valid or justifiable ground to interfere with the judgment and order of the trial court.

29. For the foregoing reasons, the appeal is dismissed.

30. Consequent upon the dismissal of the Criminal Appeal, as above, the Criminal Revision does not survive and is disposed of accordingly.

(Smt.Abhilasha Kumari,J)

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